

1 **FEDERAL ELECTION COMMISSION**

2
3 **FIRST GENERAL COUNSEL'S REPORT**

4
5 **MUR 7336**

6 DATE COMPLAINT FILED: March 1, 2018

7 DATE OF NOTIFICATION: March 5, 2018

8 DATE OF LAST RESPONSE: June 7, 2018

9 DATE ACTIVATED: July 10, 2018

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11 EXPIRATION OF SOL: February 28, 2022 – July
12 28, 2022

13 ELECTION CYCLE: 2018

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15 **COMPLAINANT:**

American Democracy Legal Fund

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17 **RESPONDENTS:**

John Michael Mulvaney

Mulvaney for Congress and Pat Jenkins in her
official capacity as treasurer (terminated)¹

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21 **RELEVANT STATUTES:**

52 U.S.C. § 30104(b)

52 U.S.C. § 30114(b)

11 C.F.R. § 104.11(b)

11 C.F.R. § 113.2

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26 **INTERNAL REPORTS CHECKED:**

Disclosure Reports

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28 **FEDERAL AGENCIES CHECKED:**

None

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30 **I. INTRODUCTION**

31 The Complaint alleges that former Representative John Michael Mulvaney converted
32 campaign funds from his authorized campaign committee to personal use after his February 2017
33 appointment as the Director of the U.S. Office of Management and Budget ("OMB"). The
34 Committee denies the personal use allegations, arguing that all expenditures were for permissible

¹ On October 27, 2017, prior to the filing of this Complaint, the Commission's Reports Analysis Division ("RAD") approved the Committee's termination. *See* Termination Report (Oct. 27, 2017), <http://docquery.fec.gov/pdf/789/201710270300093789/201710270300093789.pdf>. The fact that a committee has terminated has not prevented the Commission from considering possible enforcement action. *See* MUR First Gen. Counsel's Rpt. at n.4, MUR 6790 (Coakley).

uses.² As discussed below, we recommend that the Commission exercise its prosecutorial discretion to dismiss the allegations and close the file.

II. FACTUAL & LEGAL ANALYSIS

Mulvaney was an incumbent candidate in the 2016 election for the U.S. House of Representatives in South Carolina's Fifth Congressional District, and Mulvaney for Congress and Pat Jenkins in her official capacity as treasurer ("Committee") was his authorized campaign committee. Mulvaney won re-election on November 8, 2016. Five weeks later, President Trump nominated him to be OMB Director. Mulvaney was confirmed on February 16, 2017, and he resigned from Congress the same day.³ The Committee remained active until October 27, 2017, when RAD approved its termination.⁴

From the date Mulvaney resigned until the Committee's termination on October 27, 2017, an eight-month time period, the Committee disbursed \$96,207.86.⁵ Of that amount, the Complaint alleges that the following disbursements totaling \$42,484⁶ "have nothing to do with his past

² Mulvaney did not respond to the Complaint.

³ Mulvaney is now also the Acting Director of the Consumer Financial Protection Bureau.

⁴ See *supra* note 1.

⁵ See Mulvaney for Congress Financial Summary (2017-18 election cycle), <https://www.fec.gov/data/committee/C00471292/?tab=spending>.

⁶ The remaining disbursements included a \$32,544 transfer to Mulvaney's state senate committee to pay off debt; \$7,680.86 in contributions to other political committees; and payments for taxes, Committee personnel, and other campaign-related or winding-down expenditures, none of which appear to be personal-use type expenses. See South Carolina Public Disclosure Reports, <http://apps.sc.gov/PublicReporting/IndividualCandidate/ViewRepayments.aspx>; Mulvaney for Congress April 2017 (April 14, 2017) and July 2017 (July 13, 2017) Quarterly Reports and Termination Report (Oct. 13, 2017).

campaigns or Congressional service,” as evidenced by both the nature of the expenses and the lack of debt reported by the Committee.⁷

DATE	PAYMENT	VENDOR/PAYEE	REPORTED PURPOSE
2/27/17	\$457.87	Gula Graham	Travel
3/22/17	\$769.78	Starboard Communications	Direct Mail
5/17/17	\$440.00	Mulvaney	Travel
6/1/17	\$541.02	Capitol Hill Club	Meeting expenses
6/1/17	\$17,500.00	Huckaby Davis Lisker	Compliance consulting
6/21/17	\$750.00	Al Simpson	Strategic consulting
7/14/17	\$17,500.00	Huckaby Davis Lisker	Compliance consulting
7/17/17	\$541.02	Capitol Hill Club	Catering
7/27/17	\$2,000.00	Pat Jenkins	Administrative consulting
7/28/17	\$1,984.86	Eric Bedingfield	Strategic consulting
TOTAL	\$42,484.55		

In an unsworn response, the Committee asserts that all expenditures made after Mulvaney resigned were for costs incurred either while he was still in office or for the Committee’s winding-down activities after his resignation, though it does not specify which particular disbursements were for which purpose.⁸ The Committee does not address any of the specifically alleged personal use payments in its response, though it generally denies that any payment was for personal use, asserting that all payments were for *bona fide* campaign operating expenses, “expenses that only existed as a result of former Congressman Mulvaney serving in Congress,” or other permissible uses.⁹ The

⁷ Compl. at 1-2. The Complaint characterizes the Committee as a “zombie” committee and cites to press articles highlighting political committees that continued spending after officeholders resigned or passed away. *See, e.g.,* <http://www.tampabay.com/projects/2018/investigations/zombie-campaigns/spending-millions-after-office/>; *see also* Rulemaking Petition: Former Candidates’ Personal Use, 83 Fed. Reg. 12,283, 12,283 (March 21, 2018) (seeking comment on Petition for Rulemaking regarding personal use of former candidates and officeholders). The Commission recently revised Standard 26 of RAD’s Review and Referral Procedures to address the personal use of campaign funds by “dormant committees” of former candidates and officeholders. *See* Revisions to Standard 26: Personal Use of Campaign Funds, 2017-2018 RAD Review and Referral Procedures (approved by the Commission on April 24, 2018). In this matter, the Committee would not meet the definition of a dormant committee in the revised standard because its spending took place within months of Mulvaney’s resignation. *See id.* (defining “dormant committee” to be one for which candidate did not campaign or hold office during the previous election cycle).

⁸ Resp. at 1 (June 7, 2018).

⁹ *Id.*

1 Committee explains that it “contacted campaign vendors prior to terminating to collect any
2 outstanding bills” and that it “then paid [the bills] in full to settle all accounts.”¹⁰ Further, the
3 Committee explains that personnel were also compensated for the wind-down phase of the
4 campaign.¹¹ It acknowledges that it “did not disclose debt because it was unaware of the debt until
5 vendors were contacted to obtain outstanding balance [sic], and it had not previously received
6 invoices for these amounts.”¹²

7 **A. Personal Use**

8 The Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission
9 regulations afford federal candidates and their campaign committees wide discretion in the
10 disposition of their campaign funds and provide that contributions accepted by a candidate may be
11 used in several categories of permissible non-campaign uses of campaign funds, including the
12 “ordinary and necessary expenses incurred in connection with duties of the individual as a holder of
13 Federal office” and “any other lawful purpose” that does not convert the funds to personal use.¹³
14 Commission regulations provide that the costs of winding down the office of a former federal
15 officeholder for a period of six months after he or she leaves office are included among “ordinary
16 and necessary expenses.”¹⁴ The Commission has explained that such winding-down costs include
17 the necessary administrative costs of terminating a campaign or congressional office, such as office

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *See* 52 U.S.C. § 30114(a); 11 C.F.R. § 113.2(b), (e).

¹⁴ 11 C.F.R. § 113.2(a)(2).

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1 space and storage rental, staff salaries, and office supplies.¹⁵ This six-month winding-down period
2 “acts as a safe harbor” that is intended “to ensure that former officeholders have ample time to close
3 down their offices,” but “does not preclude a former officeholder who can demonstrate that he or
4 she has incurred ordinary and necessary winding down expenses more than six months after leaving
5 office from using campaign funds to pay those expenses.”¹⁶

6 Commission regulations specify that any use of funds that would be personal use “will not
7 be considered . . . an ordinary and necessary expense incurred in connection with the duties of a
8 holder of Federal office.”¹⁷ Conversion to personal use occurs when funds are used “to fulfill any
9 commitment, obligation, or expense of a person that would exist irrespective of the candidate’s
10 election campaign or individual’s duties as a holder of Federal office.”¹⁸ The Act and Commission
11 regulations enumerate the types of disbursements that are *per se* personal use.¹⁹ For all other
12 disbursements, including meals and travel, the regulations provide that the Commission shall
13 determine on a case-by-case basis whether a given disbursement is personal use by applying the
14 “irrespective test.”²⁰ The Commission has stated, however, that “[i]f the candidate can reasonably

¹⁵ See Advisory Op. 2013-05 (Gallegly) at 3.

¹⁶ See Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7873 (Feb. 9, 1995) (“Personal Use E&J”).

¹⁷ 11 C.F.R. § 113.1(g)(5).

¹⁸ 52 U.S.C. § 30114(b)(1).

¹⁹ 52 U.S.C. § 30114(b)(2); 11 C.F.R. § 113.1(g)(1)(i). *Per se* conversion to personal use includes utility payments, non-campaign-related automobile expenses, and dues and fees for health clubs, recreational facilities or other nonpolitical organizations unless they are part of the costs of a specific fundraising event taking place on those premises. *Id.* None of the disbursements at issue fall into the *per se* personal use category.

²⁰ See 11 C.F.R. § 113.1(g)(1)(ii).

1 show that the expenses at issue resulted from campaign or officeholder activities, the Commission
2 will not consider the use to be personal use.”²¹

3 The Complaint’s personal use allegations rely solely on the nature and timing of ten
4 disbursements disclosed in the Committee’s reports. The Committee responds that the payments at
5 issue were either payments for expenses incurred while Mulvaney was in office, or for winding-
6 down costs that arose after Mulvaney’s resignation, including compensation to campaign
7 personnel.²² Although the Committee did not specify which of the disbursements at issue were for
8 unpaid campaign expenses and which were for winding-down costs, or provide any additional
9 information from which we could conclusively determine the specific campaign-related purpose for
10 each disbursement, the payees and purposes of the alleged personal use payments appear generally
11 consistent with the Committee’s explanations. The nature of the disbursements, on their face, are
12 the type of disbursements that are typically made for campaign-related purposes, and/or permissible
13 winding-down expenses that would have occurred after Mulvaney’s resignation, *i.e.*, administrative
14 and compliance consulting, direct mail, travel, and meeting/catering expenses.²³

15 Further, a number of the disbursements were made to campaign personnel and vendors who
16 had received disbursements from the Committee at various other points throughout the 2016

²¹ See Personal Use E&J, 60 Fed. Reg. at 7863-64.

²² Resp. at 1.

²³ For at least a couple of the disbursements highlighted by the Complaint, the distinction between them being a winding-down cost versus a campaign-related expense could be material to determining whether there is personal use. In particular, if the disbursements for travel to Mulvaney (\$440) and fundraiser Gula Graham (\$457.87) were winding down costs rather than reimbursements for earlier campaign-related travel, they may be questionable as legitimate winding-down costs. These relatively modest expenses standing alone, however, do not warrant the use of additional Commission resources to investigate the specific purpose of the travel. *See, e.g.*, MUR 7127 (Sean Braddy) (Commission dismissed apparent personal use violation involving costs for vehicle maintenance because of low dollar amount at issue).

1 election cycle — Al Simpson (consultant), Eric Bedingfield (campaign manager), Gula Graham
2 (fundraising firm), Pat Jenkins (treasurer), and Starboard Communications (media vendor) — had
3 all received previous payments from the Committee prior to Mulvaney's resignation. The previous
4 payments to these payees provide some corroboration that the post-resignation payments were for
5 campaign-related services provided to the Committee while Mulvaney was in office, or for related
6 winding-down services. And all of the payments at issue occurred within the six-month winding
7 down period specified in the safe harbor window of the Commission regulations.²⁴

8 In light of these circumstances, and in the absence of any additional information showing
9 possible personal use, we recommend that the Commission exercise its prosecutorial discretion to
10 dismiss the allegation that Mulvaney and the Committee violated 52 U.S.C. § 30114(b).²⁵

11 **B. Failure to Disclose Debt**

12 The Act and Commission regulations require political committees to disclose the amount
13 and nature of outstanding debts and obligations until those debts are extinguished.²⁶ A debt or
14 obligation, including a loan, written contract, written promise, or written agreement to make an
15 expenditure over \$500 must be reported as of the date the obligation is incurred.²⁷ A debt or
16 obligation under \$500 must be reported as of the time payment is made or not later than 60 days

²⁴ See 11 C.F.R. § 113.2(a)(2).

²⁵ See *Heckler v. Chaney*, 470 U.S. 821 (1985). The alleged personal use violation would not have met the relevant RAD Referral threshold because there were no apparent *per se* personal use allegations. See RAD Review and Referral Procedures, Standard 26 (setting forth at that RAD will refer only *per se* personal uses). See also note 24 *supra*.

²⁶ 52 U.S.C. § 30104(b)(8); 11 C.F.R. §§ 104.3(d), 104.11(a).

²⁷ 11 C.F.R. § 104.11(b).

1 after such obligation is incurred, whichever comes first.²⁸ If the exact amount of a debt or
2 obligation is not known, the report shall state that the amount reported is an estimate.²⁹ Once the
3 exact amount is determined, a political committee has two options: (1) amend the report(s)
4 containing the estimate; or (2) indicate the correct amount on the report for the reporting period in
5 which the amount is determined.³⁰

6 Here, the Committee concedes that it failed to disclose debts, actual or estimated, in
7 connection with the 2016 election because it was unaware of certain debts until it contacted its
8 vendors after Mulvaney's resignation to settle any outstanding balances.³¹ As noted above, the
9 Committee does not specify which of its disbursements after Mulvaney's resignation were made to
10 pay debts incurred during the 2016 election. However, as discussed above, a review of the
11 Committee's disclosure reports shows that several of the post-resignation payments identified in the
12 Complaint were made to payees that had been vendors of the Committee during the 2016 election
13 cycle. Therefore, it appears reasonable to infer that at least this amount of the post-resignation
14 payments were for debts incurred in the 2016 campaign but not disclosed in accordance with the
15 reporting requirements of the Act.

16 Nevertheless, we do not recommend that the Commission expend additional resources to
17 pursue this apparent violation. An investigation would be required to determine which of the post-
18 resignation expenditures should have been reported as debts. And even if all of the expenses

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²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Resp. at 1.

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identified in the Complaint constituted unreported debt, the amount falls below amounts of unreported debt that the unreported debt that the Commission has previously pursued.³² Under these circumstances, we recommend that the Commission exercise its prosecutorial discretion to dismiss the allegation that the Committee failed to report debt.³³

III. RECOMMENDATIONS

1. Dismiss the allegation that Mulvaney for Congress and Pat Jenkins in her official capacity as treasurer violated 52 U.S.C. § 30104(b)(8);
2. Dismiss the allegation that John Michael Mulvaney and Mulvaney for Congress and Pat Jenkins in her official capacity as treasurer violated 52 U.S.C. § 30114(b)(1);
3. Approve the attached Factual and Legal Analysis;
4. Approve the appropriate letters; and

³² More recently, the Commission has typically proceeded in failure to report debt cases where the amount in violation was significantly greater than \$40,000 and accompanied by other violations. *See, e.g.*, MUR 7257 (Teapartyexpress.org) (\$310,000 in unreported debt plus failed to report independent expenditures); MUR 7235 (Utah Republican Party) (\$205,000 plus failed to maintain monthly payroll logs and accepted prohibited and excessive contributions); MUR 7200 (Joni for Iowa) (\$571,000 and excessive contributions). In addition, the amount in violation would not have met RAD's referral threshold of *See* RAD Review and Referral Procedures 7 (threshold for referral to OGC for omitted schedule).

³³ *See Heckler*, 470 U.S. 821.

5. Close the file.

Lisa Stevenson
Acting General Counsel

10/26/18
Date

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